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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1555

ELEANOR TAFT TILTON, MILDRED H. CLARK, CAROL D. GOLDSTONE, THEODORE GURNEY, HARVEY L. RAISNER, ELISABETH R. SWAIN, WYMAN W. PARKER, PAUL A. REYNOLDS, RUFUS BLANSHARD, JAY S. ROTH, CARL W. SCHAEFER, NORMAN T. DAVID, HERBERT T. GOLDSTONE, JAMES W. GARDNER, JR., CHARLES L. PENDLETON, *Appellants*,

v.

ROBERT H. FINCH, Secretary of the United States Department of Health, Education and Welfare, JAMES E. ALLEN, JR., Commissioner of Education of the United States, MARVIN K. PETERSON, Chairman of the Commission on Aid to Higher Education of the State of Connecticut, SACRED HEART UNIVERSITY, ANNHURST COLLEGE, FAIRFIELD UNIVERSITY, ALBERTUS MAGNUS COLLEGE, *Appellees*.

On Appeal from a Three-Judge United States District Court for the District of Connecticut

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Fairfield University, Sacred Heart University, Albertus Magnus College and Annhurst College move to affirm the judgment below on the ground that the questions upon which review is sought have been rendered so unsubstantial by the well-reasoned decision of the District Court that no further review by this Court is necessary.

QUESTIONS PRESENTED

1. Whether the Higher Education Facilities Act of 1963 can be construed in a manner that would exclude from the Act's Title I grant program otherwise eligible institutions of higher education solely because such institutions are church-related.

2. If the Act cannot be so construed, whether the inclusion of church-related colleges and universities in a major federal program designed to expand educational opportunities is contrary to the Establishment and Free Exercise Clauses of the First Amendment.

STATEMENT OF THE CASE

A. The Challenged Statute

In the early 1960s, the Nation's colleges and universities faced an acute crisis of space and burgeoning enrollments as more and more young Americans sought the advantages of higher education. Congress responded to that crisis by enacting the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58. In transmitting to Congress his legislative proposals that were incorporated in that statute, President Kennedy succinctly summarized the problems confronted by institutions of higher education:

> "The long-predicted crisis in higher education facilities is now at hand. For the next 15 years, even without additional student aid, enrollment increases in colleges will average 340,000 each year. If we are to accommodate the projected enrollment of more than 7 million college students by 1970—a doubling during the decade—$23 billion of new facilities will be needed, more than three times the quantity built during the preceding decade. This means that, unless we are to deny higher education opportunities to our youth,

American colleges and universities must expand their academic facilities at a rate much faster than their present resources will permit." H.R. Doc. No. 54, 88th Cong., 1st Sess. 7 (1963).

The concerns expressed by President Kennedy were repeatedly echoed in the congressional hearings on his legislative proposals for higher education and in the floor debates which preceded the passage of the Higher Education Facilities Act.[1] A consistent theme of those hearings and debates was that, without a substantial infusion of governmental aid, the Nation's colleges and universities would simply be unable to undertake the needed expansion of their facilities.

The Higher Education Facilities Act seeks to assist institutions of higher education to expand their enrollment capacities by providing grants and loans for the construction of academic facilities. The appellants have challenged only Title I of the Act, which authorizes grants of federal funds to public and private colleges and universities to finance, in part, the construction of undergraduate academic facilities. 20 U.S.C. §§ 711-21. The critical showing that must be made by a college or university seeking a Title I grant is that the facility to be constructed with the grant "will . . . result in an urgently needed substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel

[1] See generally, *Hearings on H.R. 3000 Before the House Comm. on Education and Labor*, 88th Cong., 1st Sess. (1963); *Hearings on S. 500 Before the Education Subcomm. of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); *Hearings on S. 580 Before the Education Subcomm. of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); 109 Cong. Rec. 14141-90, 18255-57, 18406-31, 18493-526, 18882-99, 19492-96, 20063-69, 22900-15 (1963).

of the institution, or capacity to carry out extension or continuing education programs." 20 U.S.C. § 716.

The Title I grant program is administered jointly by the federal and state governments. To enable its institutions of higher education to participate in that program, a state is required to establish an agency to carry out the state's administrative functions under the Act. 20 U.S.C. § 715. The most important of those functions performed by the state agencies are to screen applications for grants from colleges and universities within a state and to establish relative priorities among eligible projects to assure that available federal funds will have a maximum impact on increasing enrollment capacity. 20 U.S.C. §§ 715, 717.[2] Projects approved by the state agencies are forwarded to the United States Office of Education where those projects are subjected to further review to assure compliance with all requirements of the statute and the regulations promulgated thereunder. See District Court's Findings of Fact, ¶¶ 21-25, Juris. State. 36-37 (hereinafter cited as Findings).[3]

Title 4 of the challenged statute contains limitations on Title I grants that are directly relevant to the appellants' claims. Eligible institutions of higher education

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[2] The four appellee colleges and universities are located in Connecticut and, consequently, the evidence at trial relating to the administration of the challenged statute focused on the procedures followed by the Connecticut Commission on Aid to Higher Education. See Findings, ¶¶ 13-20, Juris. State. 35-36.

[3] The opinion and Findings of Fact of the District Court have not yet been reported, but they are reprinted in full in the appendices to appellants' Jurisdictional Statement. Citations to the opinion and the Findings of Fact of the court below in this Motion to Affirm will be made by reference to the appropriate pages in the Jurisdictional Statement.

are defined in a religiously neutral manner. The statute requires such institutions to be, *inter alia,* nonprofit, legally authorized by the state in which they are located to provide a program of education beyond high school, and accredited. 20 U.S.C. § 751(f). The statute also excludes from the definition of eligible academic facilities

> "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity . . . ." 20 U.S.C. § 751(a)(2).

Finally, the statute gives the federal government a twenty-year interest in all academic facilities funded under the Act, and it authorizes the government to recover a prorated share of the value of any facility which is used for a prohibited religious purpose, as defined by § 751(a)(2), during the twenty-year period. 20 U.S.C. § 754.

B. The Proceedings Below

The appellants, fifteen federal taxpayers, filed their complaint with the United States District Court for the District of Connecticut on September 25, 1968, asserting the basic claims they now ask this Court to review—namely, that Congress did not authorize grants of federal funds to church-related colleges and universities under the challenged statute and that, if such grants are authorized, Title I to that extent contravenes the Establishment and Free Exercise Clauses of the First Amendment. The named defendants, and the appellees herein, were the federal and state officials

responsible for administering Title I and four Catholic colleges and universities in Connecticut that have been the recipients of a total of five Title I grants.[4] Those institutions are Fairfield University, Sacred Heart University, Albertus Magnus College and Annhurst College.

A three-judge court was convened, as requested by the appellants, and all of the factual issues in the case were fully tried before that court. A total of 155 documentary exhibits were admitted in evidence, and testimony was taken from 22 witnesses. The appellants' evidence consisted entirely of documents obtained from the various appellees through pre-trial discovery and stipulations of fact entered into with the appellees. The appellants' central legal theory was that the Establishment Clause prohibited the granting of federal funds to so-called "sectarian" educational institutions, and the appellants' evidence focused on the alleged "sectarian" nature of the four appellee colleges and universities.[5] As a standard of sectarianism, the appellants relied on the criteria devised by the Maryland Court of Appeals in *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A.2d 51, *cert. denied,*

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[4] Fairfield University received Title I grants for the construction of a library and a science building; Sacred Heart University received a Title I grant for the construction of a library; Annhurst College received a Title I grant for the construction of a fine arts building; and Albertus Magnus College received a Title I grant for the construction of a language laboratory.

[5] The appellants' other major legal theory in the briefs they submitted to the District Court was predicated on the so-called *Everson* principle. See pp. 12-14, *infra.* At the trial of this action, however, they claimed that no evidence other than the stipulations among the parties was necessary to support that theory. Trial Transcript 14-15.

appeal dismissed 385 U.S. 97 (1966). *Cf.* Juris. State. 5-6.

The legal theory of the appellee colleges and universities had a far different focus. Relying principally on *Board of Education* v. *Allen,* 392 U.S. 236 (1968), the appellee institutions contended that it was the nature of the educational function being subsidized by the federal funds—and not the religious or nonreligious nature of the institution receiving those funds—that was dispositive of the Establishment Clause issue raised by the appellants. For that reason, the appellees objected to all evidence offered by the appellants to show the alleged "sectarian" nature of those schools, Trial Transcript 142-50, 161-62, and a principal thrust of the evidence offered by the appellee institutions, through witnesses, was to show that the academic facilities funded with federal money at their campuses were being used or would be used for strictly secular purposes. In addition, the appellee institutions presented rebuttal evidence through testimony to correct the distorted picture the appellants attempted to draw of those schools through documentary evidence.

After accepting post-trial briefs and hearing extended post-trial arguments, the District Court ruled unanimously that the challenged statute and the Title I grants received by the appellee institutions did not contravene the Establishment and Free Exercise Clauses. The District Court faithfully followed and applied the controlling constitutional principles articulated by this Court's decisions, leaving no substantial issue in the case to warrant a plenary hearing in this Court. The District Court first ruled that church-related institutions of higher learning were not excluded from receiving Title I grants. It then held that

the purpose and primary effect test prescribed by *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968), governed appellants' Establishment Clause claim. In applying that test, the District Court examined only the educational function being subsidized by the federal funds and found that function to be wholly secular. Not only did the District Court reject the appellants' invitation to decide the Establishment Clause issue according to the so-called "sectarian" nature of the appellee institutions, but it also declined to enter any findings of fact pertaining to the character or nature of those schools. Finally, the District Court relied expressly on *Board of Education* v. *Allen*, 392 U.S. 236, 248-49 (1968), in finding no merit in appellants' Free Exercise claim.

ARGUMENT

A. ISSUE OF STATUTORY CONSTRUCTION

The threshold question presented by the appellants is whether the Higher Education Facilities Act can be construed in a manner that would exclude church-related colleges and universities from participation in the Title I grant program. The basis for the appellants' contention that the statute can be so construed has shifted as the case has developed. In their complaint, the appellants flatly asserted that Congress did not intend to include church-related colleges and universities within the class of eligible institutions. See Complaint, ¶ 25. At trial, the appellants contended that Congress "sought to fudge the issue" of inclusion of church-related schools and left the question for the courts to decide. Trial Transcript 9. Now the appellants ask this Court to infer an exclusion of church-related institutions from the Act's benefits because the Act does not expressly authorize their participation. Juris. State. 6-7.

The District Court gave full consideration to the appellants' arguments on this issue and found those arguments to be wholly without merit. The District Court's reasoning is compelling. First, the District Court noted that the Act's prohibition of the use of any facility funded with a Title I grant for sectarian instruction or religious worship, 20 U.S.C. § 751(a)(2), was a clear demonstration that Congress expected church-related colleges and universities to be recipients of those grants. Secondly, the District Court examined the Act's legislative history and found convincing proof that Congress knew that the statute, as enacted, would extend its benefits to both church-related and non-church-related institutions. For example, the Act's sponsors and floor managers confirmed during the congressional debates that church-related institutions could qualify for Title I grants.[6] In addition, two amendments designed to achieve the result appellants now seek—namely, the express exclusion of so-called "sectarian" institutions—were overwhelmingly defeated.[7] Against that background, and in light of the Act's religiously neutral definition of eligible institutions, 20 U.S.C. § 751(f), the District Court held that Title I grants to church-related colleges and universities were clearly authorized by the challenged statute.

Appellants' contrary arguments simply ignore established rules of statutory construction. First, the appellants suggest that statements by a bill's sponsors and floor managers and the defeat of proposed amendments are not entitled to much credence in evaluating

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[6] See, *e.g.*, 109 Cong. Rec. 14150-51 (1963) (remarks of Rep. Powell); *id.* at 14159 (remarks of Rep. Quie); *id.* at 18409-12 (remarks of Sen. Prouty); *id.* at 19427-30 (remarks of Sen. Morse).

[7] 109 Cong. Rec. 19492-6 (1963).

legislative history. Juris. State. 6-7. This Court has repeatedly held to the contrary. When recourse to legislative history is necessary, this Court has consistently viewed the statements of a statute's sponsors or promoters as valuable aids in statutory construction. See, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 526-28 (1954); *United States* v. *United Mine Workers*, 330 U.S. 258, 278-81 (1947); *Richbourg Motor Co.* v. *United States*, 281 U.S. 528, 536 (1930). The cases also hold that a statute cannot be construed in a manner that would achieve a result Congress rejected by defeating amendments designed to achieve that result. See, *e.g.*, *Blau* v. *Lehman*, 368 U.S. 403, 410-13 (1962); *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 508-09 (1945); see also *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 94 (1935).

The appellants also invoke the familiar rule of statutory construction that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but grave doubts on that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916). But the appellants overlook the explicit limitation on the application of that rule. For that rule of construction applies only "if fairly possible." More pertinent to this case is the settled principle that a statute cannot be construed to avoid constitutional issues if such a construction would result in a "substantial rewriting" of the statute. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *United States* v. *Robel*, 389 U.S. 258, 262 (1967). The best statement of the principle is found in *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926):

> "We fully concede that it is the duty of a court in considering the validity of an act to give it such

reasonable construction as can be reached to bring it within fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitations."

For this Court to construe the Higher Education Facilities Act to exclude so-called "sectarian" colleges and universities from the benefits of Title I would indeed be substituting amendment for construction. And the amendment that would be substituted would be one that Congress specifically rejected. If, as a result of rejecting the statutory construction urged by the appellants, this Court must reach and decide the constitutional questions presented by appellants, the Court will merely be exercising its traditional and necessary judicial function. That function cannot be avoided by engaging in an exercise of legislative power under the guise of statutory construction.

B. THE ESTABLISHMENT CLAUSE ISSUE

The appellants make a two-pronged assault on the District Court's conclusion that the awarding of Title I grants to church-related colleges and universities does not offend the Establishment Clause. The appellants' basic theory is, as it was in the court below, that the controlling Establishment Clause test is the so-called *Everson* principle, which they read as imposing an absolute bar to providing public funds to any institutions which teach or practice religion. Juris. State. 9. Necessarily implicit in that position is an argument that the appellants made explicitly in the court below—namely, that the so-called *Everson* principle, and not the purpose and primary effect test prescribed by this Court in *Board of Education* v. *Allen, supra,* is the

measure of constitutional validity. The appellants' alternative position is that, even if the purpose and primary effect test applies, the extension of federal funds to church-related colleges and universities is constitutionally infirm. Both of appellants' arguments are totally lacking in merit.

1. The Everson Principle

The appellants have premised their basic legal theory on a single sentence from the majority opinion in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). That sentence reads as follows:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U.S., at 16.

The District Court found that the appellants' reliance on that language of *Everson,* rather than the holding in the case, to be misplaced. For, despite the sweeping limitations implicit in the sentence relied upon by the appellants, this Court held in *Everson* that the use of public funds to reimburse parents for the cost of sending their children by public transportation to parochial schools did not violate the Establishment Clause, even though parochial schools realized tangible benefits from that form of public aid. 330 U.S., at 17.

The District Court's cryptic dismissal of the appellants' reliance on the so-called *Everson* principle anticipated the discussion of *Everson* in *Walz* v. *Tax Commission,* 38 U.S.L.W. 4347, 4348 (U.S. May 4, 1970), where this Court specifically warned of "[t]he hazards of placing too much weight on a few words or phrases of the Court." This Court also agreed that the spend-

ing program challenged in *Everson* resulted in "aid" to church-related schools but that such aid was not inconsistent with the Establishment Clause. 38 U.S. L.W., at 4348-49. Since the schools that benefited from the bus transportation subsidy surely taught and practiced religion, as the appellants use that term, the sweeping reading that the appellants give to the so-called *Everson* principle simply cannot be reconciled with this Court's Establishment Clause decisions.

Thus, it is quite clear that the "principle" that the appellants extract from a single sentence in *Everson* is in no sense a test of constitutional validity. That sentence was one of several in *Everson* in which this Court attempted, in very broad and abstract terms, to describe the general categories of problems which are cognizable under the Establishment Clause. See 330 U.S., at 15-16. But that sentence was in no sense self-defining in the limitations it suggested that the Establishment Clause imposed upon government power. At the trial of this action, even the appellants appeared to recognize that critical distinction between a general principle and a constitutional test. Initially the appellants contended that the so-called *Everson* principle barred public financial assistance to all institutions which teach or practice religion. See Trial Transcript 11-14. Subsequently, the appellants suggested that the constitutional bar should extend, not to colleges which teach religion objectively, but only to those colleges which propagate religious doctrine. See *id.*, at 32-33. Similarly, the word "support" in the sentence relied upon by the appellants is not self-defining, since this Court has held that the validity of public programs providing support for church-related schools is a question of degree. *Board of Education* v. *Allen*, 392 U.S.

236, 244 (1968). Thus, the so-called *Everson* principle cannot be employed as a constitutional test to assess the compatibility of the Title I grant program with Establishment Clause limitations.

2. Appellants' Application of the Allen Test

The appellants also argue that Title I grants to church-related colleges and universities are constitutionally infirm under the purpose and primary effect test prescribed by *Board of Education* v. *Allen, supra.* The appellants reach that result only by misapplying the *Allen* test.

The purpose and primary effect test was first articulated by this Court in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963), when it ruled that devotional readings from the Bible in public school classrooms violated the Establishment Clause. In applying that test to the somewhat different problem of public financial assistance to church-related education, the Court in *Allen* quoted fully from *Schempp* the language setting forth the test:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S., at 243.

The critical inquiry under that test, therefore, is "what are the purposes and primary effect *of the enactment*" that is challenged on Establishment Clause grounds. The appellants, however, would have this Court assess the constitutionality of the Higher Education Facili-

ties Act by examining the purpose and the primary effect of institutions that receive Title I grants. Juris. State. 10-11. By shifting the focus of the purpose and primary effect test from the statute they have challenged to the institutions they have joined as defendants in this action, appellants are, in effect, asking this Court to abandon the constitutional test established only two years ago in the *Allen* case and to create a wholly new constitutional standard.

The appellants' distortion of the *Allen* test is simply a variation on the lengthy argument they made in the court below based on the decision in *Horace Mann League* v. *Board of Public Works,* 242 Md. 645, 220 A.2d 51, *cert. denied, appeal dismissed* 385 U.S. 97 (1966). Relying solely on that state court decision, the appellants insisted that the validity of a Title I grant should be measured by the sectarian or nonsectarian nature of a recipient college or university. And they argued that, in determining what constitutes a sectarian institution, the District Court should have employed the several criteria devised by the *Horace Mann* court. The District Court rejected the appellants' argument for the very sensible reason that the *Horace Mann* decision is in conflict with this Court's decision in *Allen.* Juris. State. 25, n. 14. The District Court's ruling on that point is indisputable, since the court in *Horace Mann* explicitly refused to apply the purpose and primary effect test adopted by this Court in *Allen.* See 220 A.2d, at 60-65.

One other point should be noted in connection with the appellants' misapplication of the purpose and primary effect test. The appellants may have inadvertently misled the Court concerning the record in this case by their argumentative depiction of a purely hypo-

thetical church-related college. Toward the end of their Jurisdictional Statement, the appellants describe

> "an institution which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in theology and doctrines of the religion, and does everything to propagate and advance a particular religion other than confer a degree in divinity." Juris. State. 10-11.

Even a casual reading of the record in this case will reveal that none of the appellee colleges and universities bears even the vaguest resemblance to the hypothetical institution described by the appellants. In addition, if the appellants fear that the hypothetical institution they have described will use federal funds for impermissible religious purposes, a proper application of the purpose and primary effect test will prevent such an unconstitutional result. For, as will be demonstrated below, the purpose and primary effect test as applied in *Allen* bars any use of public funds for the religious functions of church-related institutions, and carefully limits the use of such funds to support the secular educational functions performed by church-related colleges.

3. Proper Application of the Allen Test

The court below precisely followed the *Allen* decision in applying the purpose and primary effect test, and it found no constitutional infirmity in awarding Title I grants to church-related colleges and universities.

The *Allen* decision requires that a court, in searching for the purpose of a challenged enactment, look

first to any statement of purpose contained in the statute. 392 U.S., at 239, 243. If the enactment contains such a statement of purpose, the court's inquiry is necessarily ended. The District Court noted that the Higher Education Facilities Act contains the following detailed expression of legislative purpose:

> "The Congress hereby finds that the security and welfare of the United States require that this and future generations of American Youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education. The Congress further finds and declares that these needs are so great and these steps so urgent that it is incumbent upon the Nation to take positive and immediate action to meet these needs through assistance to institutions of higher education, including graduate and undergraduate institutions, junior and community colleges, and technical institutes, in providing certain academic facilities." 20 U.S.C. § 701.

The District Court correctly found "an ample rational basis in the evidence before Congress for such findings," Juris. State. 25, and concluded that the challenged statute had a demonstrably secular purpose. It also held that "the Act does not have the purpose of promoting religion of any kind." *Id.*

In *Allen,* this Court ruled that church-related schools perform the dual functions of religious instruction and secular education. 392 U.S., at 245, 248. That proven dichotomy in the curricula of church-related schools

was the basis for the District Court's primary effect analysis. The District Court stated:

> "The focus of this test [of primary effect] as applied in *Allen* is the function, secular or religious, which the government aid subsidizes—not the nature of the institution, secular or religious, which receives the aid." Juris. State. 25.

That court then observed:

> "The Act before us was carefully drafted to insure that grants made to church-related educational institutions would subsidize the secular rather than the religious functions of such institutions. It authorizes grants only for the construction of academic facilities to be used for secular purposes; and specifically prohibits grants for the construction of any facility to be used for religious instruction or worship." Juris. State. 26-27.

The District Court also found, on the basis of uncontroverted evidence, that the five Title I grants received by appellee colleges and universities had been or would be used for solely nonreligious purposes. Findings, ¶¶ 26-42, Juris. State. 37-42. On that basis, the District Court held that the Higher Education Facilities Act had the necessary primary secular effect to survive an Establishment Clause challenge.

The District Court's primary effect analysis was clearly consistent with the *Allen* decision. At issue in that case was New York's textbook loan law which required local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including students attending church-related schools. In attempting to distinguish the *Everson* decision, the appellants argued that free textbooks were constitutionally distinct from free bus

rides because textbooks are part of the educational process and because the entire educational process in church-related schools is religious in nature. 392 U.S., at 245.

This Court examined that contention at length and concluded that its own prior decisions, plus

> "a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education." 392 U.S., at 248.

This Court also held that the challenged New York statute did not violate the Establishment Clause because that enactment authorized the lending of only secular textbooks to students in church-related schools. 392 U.S., at 244-45. Consequently, the District Court applied the proper measure of the statute's primary effect by focusing on the educational function subsidized by Title I grants.

As this Court has recently reaffirmed, the command of the Establishment Clause is that government be neutral in matters touching upon the religious affairs of its people. See *Walz* v. *Tax Commission*, 38 U.S.L.W. 4347 (U.S. May 4, 1970). The purpose and primary effect test, as conceived and applied in *Schempp* and *Allen*, precisely implements that constitutional command. In sustaining the Higher Education Facilities Act under that test, the District Court scrupulously observed that wholesome principle of neutrality. That court observed:

> "It would be ironic indeed if this Act of Congress, so specifically and precisely written to com-

> ply with the constitutional standard of secular legislative purpose and a primary effect that neither advances nor inhibits religion, were to be stricken down in the name of religious freedom." Juris. State. 28.

Religious freedom and government neutrality in religious matters would surely be the victims if a college's church relationship were the sole basis for excluding it from participation in a major federal program designed to increase educational opportunities for young Americans.

C. THE FREE EXERCISE CLAUSE ISSUE

The Jurisdictional Statement contains no explication of appellants' Free Exercise Clause claim. In their complaint, however, the appellants alleged that awarding Title I grants to church-related colleges and universities offended the Free Exercise Clause because such grants "constitute compulsory taxation for religious purposes." See Complaint, ¶ 30. The District Court rejected that claim for the same reason that this Court rejected the Free Exercise Clause claim of the appellants in the *Allen* case. Quoting directly from *Abington School Dist.* v. *Schempp, supra,* this Court ruled in *Allen* that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." 392 U.S., at 248-49; see also *Engel* v. *Vitale,* 370 U.S. 421, 430 (1962); *Torcaso* v. *Watkins,* 367 U.S. 488, 495 (1961). The District Court ruled that appellants "have not shown that the Act coerces them as individuals in the practice of their religion in any way." Juris. State. 27.

The District Court found the Free Exercise Clause claim factually deficient for another reason. Because

that court had found the challenged statute to be secular in both purpose and primary effect, it could not accept the appellants' characterization of the statute as constituting compulsory taxation for "religious purposes."

The appellants have not even attempted to dispute the bases on which the District Court dismissed their Free Exercise Clause claim. The lack of merit in that claim is therefore apparent.

CONCLUSION

The judgment below should be affirmed because the decision of the District Court has rendered unsubstantial the questions the appellants ask this Court to review.[8]

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Respectfully submitted,

EDWARD BENNETT WILLIAMS
JEREMIAH C. COLLINS
Attorneys for Appellee Colleges and Universities

Of Counsel:

HOWARD T. OWENS
JAMES J. O'CONNELL
DONALD F. KEEFE
LAWRENCE W. IANNOTTI
BRUCE LEWELLYN

[8] The question of the Establishment Clause validity of granting public funds to church-related elementary and secondary schools is a central issue in *Lemon* v. *Kurtzman*, No. 1189, October Term, 1969, *prob. juris. noted*, 38 U.S.L.W. 3401 (U.S. April 20, 1970). Should the Court grant a plenary hearing in this case, it is respectfully suggested that this case be set for argument with *Lemon* v. *Kurtzman, supra.*